

IN THE MATTER OF NATIONAL TRAINING, INC.
Respondent.

Docket No. 93-98-SA
Student Financial Assistance Proceeding

DECISION

A decision in Docket Number 92-93-SA the prior proceeding) dated February 23, 1993, terminating an appeal of a final program review determination of June 8, 1992, was issued without a prior opportunity (notice) for respondent to oppose the termination of the appeal. Respondent objects to this omission. Because of the lack of notice, the decision of February 23, 1993, is void and without effect. (Notice is crucial to proposed final action)

The matter in 92-93-SA is substantially identical to the final audit determination matter at hand. (The cause of action is the same although the amount of recoupment is somewhat reduced.) However, there has been a substantive change in law. The Administrative Procedure Act (APA) does not apply to the instant dispute between the parties, although it did apply to the prior proceeding.

Because of this legislative change, I believe that respondent must be restored to the position it held prior to the legislative change. (The law currently in effect is applied, except where there is substantial prejudice. Here, the legislative change deleting APA requirements substantially prejudices the respondent.)

Counsel for the Student Financial Assistance Programs asserts that there is no substantive difference between the APA and the past and present procedural provisions of Department of Education rules. This is incorrect. The APA requires cross-examination in circumstances where there is a material dispute of fact (dispositive of the overall merits of the litigation) which cannot be resolved on a written record. However, ED rules, past and present, do not provide for cross-examination. Thus, there is a material difference between the APA and ED rules. ED seeks somewhat more than \$50,000,000 from respondent, as it also did in the prior proceeding. This relief turns in major part upon untested expert testimony concerning educational course content which was prepared for ED in May of 1991. [See footnote 1](#)¹ I find that the matter is one which cannot fairly be resolved without an oral hearing allowing for cross-examination of witnesses, in particular the experts.

Counsel for the Student Financial Assistance Programs correctly notes that ED rules, past and present, do not allow for cross-examination of witnesses in an ED final audit determination. ED counsel also correctly notes that under ED rules, ALJ's have no authority to waive ED rules. However, for cause shown, the Secretary of Education may order an APA hearing. Although the Secretary also is bound by ED rules, the Secretary does have discretion. Constitutional and legislative requirements may be imposed by the Secretary in order to insure proper regard for due process under the Constitution and the APA.

Thus, the instant proceeding, which is not subject to the APA, would be processed under non-APA standards, which is a material difference from the prior proceeding which is so subject. In the circumstances presented, I find that the instant proceeding should be dismissed with prejudice because the subject matter is duplicative of a still pending prior proceeding in Docket Number 92-93-SA which must be processed under provisions of the APA. Even though I have no authority to order cross-examination under ED rules, I conclude that the APA is applicable to the dispute. Whether the Secretary of Education is required to set the prior proceeding for a due process oral hearing under the APA is a matter not committed to me for decision. I find only that prior proceeding takes precedence over the instant proceeding.

This proceeding, No. 93-98-SA is dismissed with prejudice, without prejudice to the proceeding in No. 92-93-SA.

Dated this 15th day of December, 1993.

Paul S. Cross
Administrative Law Judge
Office of Higher Education Appeals
U.S. Department of Education
400 Maryland Avenue, SW
Washington, DC 20202-3644

Footnote: 1 ¹ This expert testimony was available to ED at the time of the completion of final program review determination in the prior proceeding. The expert testimony was not submitted, although respondent itself submitted expert testimony.